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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GARREY CARRUTHERS, Governor;
HAL STRATTON, Attorney General;
O. LANE MCCOTTER, Secretary of Corrections;
ROBERT TANSEY, Warden, PNM,
Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293,
SHARON TOWERS, and all others similarly situated;
JAMES C. GIBSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether an order awarding attorneys' fees pursuant to 42 U.S.C. § 1988 for post-judgment monitoring and enforcement of an injunctive decree during a specified time period is shielded from an immediate appeal on the ground that other fee petitions, covering entirely separate time periods, are pending in the district court and are likely to be filed in the future.

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JAMES C. GIBSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners—the Governor and other executive officials of the State of New Mexico—hereby ask this Court to grant a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit dismissing their appeal from an order directing them to pay attorneys' fees and costs relating to post-judgment monitoring and enforcement of a consent decree.[1]

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[1] The parties in the courts below were those listed in the caption or their official predecessors, plus Robert Montoya and Jose Lujan.

OPINIONS BELOW

The *per curiam* order of the United States Court of Appeals for the Tenth Circuit is unreported and is reprinted here as Appendix A. The opinion of the United States District Court for the District of New Mexico is unreported and is reprinted as Appendix B. The order of the Tenth Circuit denying rehearing and rehearing *en banc* is reprinted as Appendix C.

JURISDICTION

The order dismissing petitioners' appeal was entered by the United States Court of Appeals for the Tenth Circuit on August 27, 1987. Petitioners' timely petition for rehearing was denied on November 10, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 1291 states in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

STATEMENT

This case is a class action covering virtually every aspect of the services and conditions provided in medium and maximum security prisons in New Mexico. Suit was filed in 1977 and the parties in 1980 agreed to a comprehensive 206-page consent decree setting detailed standards for the operation of the then-existing Penitentiary of New Mexico as well as three later-constructed facilities. As in many cases of this breadth and complexity, the implementation of the consent decree has involved significant monitoring efforts by counsel for the plaintiffs, including various motions for contempt.[2] Petitioners—

[2] *See, e.g., Duran v. Anaya*, 642 F. Supp. 510 (D. N.M. 1986).

the defendants in this matter—have also filed several motions for modification of the decree. At present, the end of this "implementation phase" of the case is nowhere in sight.

The ruling at issue here is an order of the district court that both granted respondents' motion for attorneys' fees and costs under 42 U.S.C. § 1988 for litigation activities during July and August of 1985 and directed the State of New Mexico to pay $54,389.41. Pet. App. B. The plaintiffs had previously received several hundred thousand dollars in fees and costs in the case,[3] and the court now has under consideration requests for several hundred thousand dollars in additional compensation for activities undertaken in September-October 1985, November 1985-June 1986 and July-May 1987. During the two-month period at issue in this petition, counsel for respondents were engaged in two types of activities. First, they were continuing their usual monitoring of compliance with the decree. Second, at the request of the court, they were conducting negotiations with the defendants concerning allegations of noncompliance with the decree as well as requests for modification of the decree being contemplated by defendants. Pet. App. 4a.[4]

The district court did not rule on the fee application for this two-month period (July-August 1985) until April 28, 1987. On that date, the court awarded re-

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[3] Defendant's Response to Plaintiff's Motion And Application For Attorneys' Fees and Expenses for the Period of July and August, 1985, at 5.

[4] When these negotiations proved unsuccessful, respondents moved for contempt and petitioners filed their requests for modification. The contempt issues were later dismissed by the plaintiffs with prejudice in return for withdrawal by the defendants of some of their modification requests without prejudice, as well as creation of a committee to deal with the issue of inmate "good time" credits. The district court has yet to rule on defendants' proposed modifications.

spondents the full amount that they requested in their fee motion. Petitioners then filed a timely notice of appeal to the Tenth Circuit. They intended to argue on appeal, as they had in the district court, that the fee award as a whole was excessive and that the plaintiffs should have been required to show concrete results from their activities—at least with respect to the negotiations on noncompliance and the proposed modifications to the decree.

Before these issues could be briefed, however, respondents filed a motion to dismiss the appeal. They argued that the fee award was an unappealable "interim order" because there remained pending in the district court subsequent fee petitions covering later periods of time. They added that these later fee requests covered activities that were related to those undertaken in July and August 1985. The did not, however, suggest that the award at issue was in any sense tentative or subject to revision.

Petitioners responded to this motion by arguing that the award was both collateral to the merits of the case and "final" in the sense that it resolved fully the plaintiffs' right to fees and costs for the relevant time period. They distinguished the cases cited by the plaintiffs on the ground that they involved interim awards of fees for activities *prior* to the entry of judgment, which were subject to later modification at the time of judgment and thus arguably not sufficiently final to allow an immediate appeal. In the instant case, by contrast, the fee award came seven years after the entry of a judgment in the form of a consent decree, was not subject to modification at the time of some later "final" award and, indeed, could never be reviewed on appeal if not reviewed at this time. Respondents argued in reply that the fee award was somehow inherently subject to later modification at such time as the district court entered a "final" fee award. They did not, however, suggest how

the overall issue of petitioners' liability for post-judgment fees would ever, in the context of this case, be reconsidered in such a "final" order.

A panel of the Tenth Circuit granted the motion to dismiss on August 27, 1987. It held that the district court's ruling was not properly subject to an immediate appeal because petitioners had "not shown that this interim award is 'effectively unreviewable' after entry of the final award." Pet. App. 3a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). In support of this proposition, the court cited its earlier ruling in *In re Callister*, 673 F.2d 305, 306-07 (10th Cir. 1982), which held that a *pre-judgment* award of fees as an administration expense in a bankruptcy case was not immediately appealable because such an award was subject to modification at the time of a final award in connection with the final judgment in the case. *See* Pet. App. 3a.

Petitioners sought a rehearing from the panel, pointing out that the court appeared to have misunderstood the factual setting of this case when it suggested that the fee award at issue could be appealed when the district court later enters a "final award." As noted above, by the nature of the post-judgment implementation process in this case, there will never be a fee ruling that is any more "final" than the present order; the district court merely considers fee requests for specified periods of time and rules on them one by one. Petitioners also suggested a need for a rehearing *en banc* in the event that the panel had accurately understood the relevant facts. They argued that the panel's treatment of this fee award as "interim" and unappealable meant, in effect, that all post-judgment awards attributable to monitoring or enforcement of previous judgments could be permanently insulated from appellate review.

On November 10, 1987, the panel denied rehearing, stating that it had reviewed petitioners' factual presenta-

tion and remained convinced that "[a]s of the date of the entry of the order appealed from, no final judgment had been entered by the district court." Pet. App. 7a (citing 28 U.S.C. § 1291). The request for rehearing *en banc* was also denied on the same date.

ARGUMENT

This case warrants review for two reasons. First, the Tenth Circuit's ruling—that post-judgment fee awards for particular periods of time during the implementation of a complex injunctive decree are not appealable until the entry of a "final" award—is clearly indefensible. It conflicts with the handling of similar appeals in at least seven other Circuits and, more fundamentally, is irreconcilable with the general principles of appealability. Second, in the absence of some action by this Court, the State of New Mexico will be left in the untenable position of being subject to numerous orders to pay hundreds of thousands of dollars in fees and costs without any realistic chance that these awards will ever become appealable. Thus, even though the ruling below is unpublished, this case is nonetheless of sufficient importance to merit review. Indeed, in light of this serious practical problem and the clarity of the legal issues raised here, we believe that this is an appropriate case for a summary reversal.

I. The Decision Below Is Plainly Incorrect.

The Tenth Circuit's ruling dismissing petitioners' appeal from a post-judgment order directing them to pay attorneys' fees and costs—an order that was neither tentative on its face nor likely ever to be reconsidered by the district court at any later date—is without any legal basis. To our knowledge, no other Circuit has followed that approach. On the other hand, at least seven Circuits, when faced with immediate appeals of post-judgment fee awards comparable to that involved here, have reached the merits of the fee award. *See Keith v. Volpe*, 833 F.2d

850 (9th Cir. 1987); *Brewster v. Dukakis*, 786 F.2d 16 (1st Cir. 1986); *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986); *Adams v. Mathis*, 752 F.2d 553 (11th Cir. 1985); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272 (3d Cir. 1984), *aff'd in part and rev'd in part on other grounds*, 106 S. Ct. 3088 (1986), *rev'd on other grounds*, 107 S. Ct. 3078 (1987); *Willie M. v. Hunt*, 732 F.2d 383 (4th Cir. 1984); *Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980); *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The Eleventh Circuit's ruling in *Turner v. Orr*, *supra*, provides a good example of the prevailing rule. That case involved a consent decree aimed at curing problems of racial discrimination at a military base. The decree established a process for employees and applicants to complain of alleged violations of the decree first to a Plaintiff's Monitoring Committee and then, via the Committee, to a special master. Counsel for the Committee filed what the circuit court acknowledged was an *initial* request for post-judgment fees, 785 F.2d at 1500, which the district court awarded. The defendants appealed and the court of appeals, unlike the Tenth Circuit in this case, reviewed the award on the merits.

To be sure, in *Turner v. Orr* and most of the other cases cited above, there was no express discussion of jurisdiction.[5] The sole exception on the list is *Keith v. Volpe*, *supra*, where the Ninth Circuit explicitly found that it had "jurisdiction under 28 U.S.C. § 1291" to review fees awarded for post-judgment monitoring of an earlier consent decree. 833 F.2d at 851. It did so despite the

[5] This silence is itself telling. Because of the jurisdictional nature of finality, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), even where the parties do not contest the appealability of an order, a court is "obligated to do so on [its] own motion if a question thereto exists." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

fact that it was clear that the fee petition in dispute was *not* the last that was to be entertained in the case. Not only had the district court begun to require quarterly fee applications from plaintiffs' attorneys, *id.* at 860 n.6, but an appeal of a separate award, for other monitoring activities, was also pending at the time, *id.* at 853 n.2.

This approach is fully supported by the rulings of this Court. As an initial matter, we note that immediate appealability of post-judgment fee awards was given at least implicit support in both *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986), and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987). In each instance, the Court reviewed an award of fees for monitoring compliance with a consent decree over a discrete time period. The award, which "relate[d] only to work performed *after* entry of the consent decree," 762 F.2d at 274 (emphasis in original), had been appealed immediately to the Third Circuit, which reached the merits. This Court, like the court of appeals before it, did not question the finality of the fee order or even ask, as the Tenth Circuit did here, whether later fee petitions might be filed. Indeed, in view of the bitter and protracted history of non-compliance with the consent decree at issue in *Delaware Valley*, it seems apparent that there may be future issues that might well lead to subsequent fee awards.

More fundamentally, the prevailing rule on immediate appealability of post-judgment fee awards derives directly from the basic principles governing appealability of district court orders in general. *See generally Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). A district court order, although not the "final judgment" in a case, may nevertheless be appealed as a "final decision" under 28 U.S.C. § 1291 if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action,

and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This test fully supports jurisdiction for immediate appeals of post-judgment fee awards covering particular time periods during the implementation of injunctive decrees.

First, as the Tenth Circuit seemed to acknowledge, there can be no doubt that such a fee order is "separate from the merits of the action." This Court held in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451, (1982), that a claim "for attorney's fees under 42 U.S.C. § 1988 raises legal issues collateral to the main cause of action" and "uniquely separable" from it.[6] Second, it is clear that such an order may have "conclusively determined" a disputed issue. Indeed, the Tenth Circuit here did not and could not find that the present order—directing immediate payment of a sum certain—was somehow tentative or that it was an issue that would later be revisited and then be subject to modification.

It does not matter, in this regard, that this is not the last fee petition in the post-judgment phase of the case. It is clear that "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Rather, an order is

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[6] Although *White* held only that a motion for attorneys' fees was not a motion to amend a judgment under Federal Rule of Civil Procedure 59(e), its analysis clearly applies to the present issue. *See generally*, Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Court*, 69 Corn. L. Rev. 207, 221-223 (1984). Rule 59(e) only applies where a supplemental motion amends a judgment; judgments, in turn, are defined only by their appealability. *See* Fed. R. Civ. P. 54(a) (" 'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). The Court in *White* held that the merits judgment is appealable without the fee issue being determined because a motion for fees does not amend the judgment on the merits. If it is to be appealable at all, therefore, a fee award arising after final judgment must be separately appealable.

final when the district court contemplates no future modification of it. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983).

In the face of these settled principles, the Tenth Circuit based its ruling on the conclusion that "[t]his order does not meet the third prong of *Coopers & Lybrand*, 437 U.S. 463. Defendants have not shown that this interim award is 'effectively unreviewable' after entry of the final award." Pet. App. 3a (citing *In re Callister*, 673 F.2d 305 (10th Cir. 1982)). This conclusion is unsupportable. We recognize, of course, that there are many types of pretrial orders that, although definitive, are not properly subject to review until the time of a final merits determination.[7] Moreover, even certain types of post-judgment orders are insulated from immediate review because they will predictably be followed by appealable orders that fully resolve the particular post-judgment dispute.[8] But this is not such a case.

To the contrary, where, as here, the district court's order has conclusively determined liability for fees related to a particular post-judgment time period, and later fee orders will involve only later time periods, it is virtually certain that review of each fee order will be foreclosed if not allowed immediately. Such later review could only be obtained if the district court were, at some point, to undertake a "global" review of its various post-judgment fee awards covering separate time periods.

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[7] *See, e.g., Richardson-Merrel, Inc. v. Koller*, 472 U.S. 424 (1985) (pretrial order dismissing counsel in civil case not separately appealable); *Flanagan v. United States*, 465 U.S. 259 (1984) (same for pretrial order in criminal case); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (same for pretrial denial of motion to dismiss counsel in civil case).

[8] *See, e.g., Fox v. Capital Co.*, 299 U.S. 105 (1936) (post-judgment order fining party for refusal to testify); 9 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 110.14[1], at 198 (2d ed. 1987).

But, in a post-judgment context, there is no reason to anticipate some sort of "final" fee order that would extend back over many periods for which fees had previously been ordered. The district court here has never indicated any intent to undertake such a review. Moreover, it is difficult to see how the occasion for such a review would arise since, in the post-judgment context, it is seldom possible to be sure that all necessary monitoring and enforcement efforts have been completed so that the issue of overall fee liability can be conclusively determined.

In sum, the Tenth Circuit's ruling apparently rests on the mere possibility that the district court may someday reconsider its otherwise definitive fee order. But the mere fact that the court has the theoretical power to change its ruling does not preclude collateral review absent some clearer indication that such a revision is contemplated. *Moses H. Cone Memorial Hosp., supra*, 460 U.S. at 12. In a post-judgment fee context, there is no reason for believing that this will occur. Thus, once an issue is resolved by the district court, "appellate review is desirable, and cannot reasonably be left to depend upon the hazards of opportunity to appeal from some other final decision." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3916, at 610.

In light of these general principles, the numerous decisions of the courts of appeals cited above—allowing immediate appeals of fee awards for post-judgment activities during ongoing implementation of injunctions—are clearly correct. Indeed, the appropriateness of such a procedure was recognized by this Court as early as the decision in *Trustees v. Greenough*, 105 U.S. 527 (1881). *See also In re Farmers' Loan & Trust Co.*, 129 U.S. 206 (1889). There, the Court held that an award of fees and costs out of a common fund was immediately appealable even though it was clear that administration of the fund would continue for some time. 105 U.S. at 531.

The sole authority cited by the Tenth Circuit to support its departure from this body of precedent was *In re Callister*, 673 F.2d 305 (10th Cir. 1982), a case concerning a *pre*-judgment award of fees. Pet. App. 3a. As we have suggested, the relevant considerations are quite different when a district court enters an "interim" fee order prior to judgment. Finality has been made a prerequisite to appealability in order to guard against the possibility of both piecemeal review and interference by an appellate court in ongoing district court proceedings. In a pre-judgment context, these goals are often served by delaying appeals of interim orders until the entry of a final judgment.

For these reasons, it may be proper to deny immediate appeal of a fee order that, unlike the one here, is entered prior to judgment. We note, however, that the decisions of the courts of appeals even on this question are difficult to reconcile. While some Circuits appear to bar pre-judgment appeals in most or all cases,[9] at least two Circuits have authorized such appeals. In *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir. 1986), for example, the Eleventh Circuit concluded that a fee award under the Equal Access to Justice Act, which was related to successful efforts to secure an interim injunction prior to entry of a final judgment, had "finally dispose[d] of the issue of attorneys' fees for litigating the case until this point" and thus could be appealed. 791 F.2d at 1494. Likewise, in *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2180 (1987)—a prison class action similar to the present case—the Seventh Circuit allowed an immediate appeal of a fee order related to the entry of a preliminary injunction. It reasoned that the order created a final obligation to pay and that, in such a case, the defendants

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[9] *See, e.g., Hillery v. Rushen*, 702 F.2d 848 (9th Cir. 1983) (*per curiam*); *Yakowicz v. Commonwealth of Pennsylvania*, 683 F.2d 778 (3d Cir. 1982); *Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980).

could not be assured of restitution of the payment if their appeal were delayed. 806 F.2d at 1317-20.

Clearly, the Tenth Circuit's dismissal of a *post*-judgment fee appeal cannot be squared with these two rulings. In any event, regardless of the correct rule governing pre-judgment orders, there is simply no argument for denying petitioners an immediate appeal in this post-judgment setting. After judgment, "[t]he policy against and the probability of piecemeal review is not as decisive a consideration . . . since the underlying dispute is already settled."[10] *United States v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *see also Joseph F. Hughes & Co. v. United Plumbing & Heating, Inc.*, 390 F.2d 629, 630 (6th Cir. 1968); *Plymouth Mut. Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co.*, 378 F.2d 389, 391 (3d Cir. 1967). Moreover, after judgment, concerns about interference with the trial court's consideration of the case are far less salient. *See* 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3916, at 607 (1976). Most importantly, as noted above, in a post-judgment setting like the present one, there is often no assurance that there will ever be a later event reviving a right to appeal prior orders.

II. Absent Review, Petitioners Will Be Left With No Procedure for Challenging Post-Judgment Fee Awards That They Believe are Excessive or Otherwise Unjustified.

We recognize that the decision below is not a published order and therefore under Tenth Circuit Rule 36.3 does not create a formal conflict among governing precedents in the Circuits. This fact does not, however, mean that

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[10] It is true that in the present case petitioners may ultimately be forced to bring several appeals of separate post-judgment fee awards relating to separate time periods. But this danger is entirely the result of the district court's decision to consider application for post-judgment fees and costs one at a time.

it would be appropriate for this Court to deny review here. The practical difficulties and basic unfairness created by the Tenth Circuit's erroneous ruling for petitioners—and potentially other litigants as well—require correction. In our view, the appropriate action in this situation would be a summary reversal.

There can be no doubt that the Tenth Circuit's order puts petitioners, the State of New Mexico, in an untenable position. Rather than allowing an immediate appeal from each post-judgment order to pay fees, the court of appeals has required an aggrieved party to await a "final award." Pet. App. 3a. There are two possible, but equally senseless, interpretations of this order. First, the order may mean that petitioners must hold all appeals of fee awards—potentially reaching hundreds of thousands of dollars—until such a time as the district court has made the last discrete award of fees in this case. If so, this rule is clearly unworkable. Because of the possibility of continued monitoring, contempt motions, and even the defendant's own prerogative to bring a motion to modify the injunction, any particular fee award can only be deemed the last of a series after the fact, with the hindsight that can only be gained long after the expiration of the thirty days in which an appeal can be noticed. Fed. R. App. P. 4(a). Thus, in deciding whether to appeal, petitioners would be left to guess about whether a particular award is the last one. And they would make this guess subject to the risk that an error could lead to loss of their right to challenge all fee awards previously entered.

Second, the Tenth Circuit may have been assuming that there would one day be a plenary review of all post-judgment fees by the district court—leading to a "final award" covering the entire implementation period. If so, the problem is that there is no reason to expect that this will ever occur. As noted above, the district court has never indicated any such plan. Moreover,

the court itself would have great difficulty in determining precisely when it would be appropriate to conduct such a final review of post-judgment fees. The continuing obligations imposed on petitioners will always create a potential for further litigation and therefore additional fee liability.

Because, in this context, "denial of immediate review would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971), there is a real need for action by this Court. Indeed, under either interpretation of the Tenth Circuit's ruling, it could be years before an appeal on post-judgment fees might be had, assuming it could ever be had at all. At that point, there is the very real danger that, as a practical matter, the defendants will simply be unable to recoup payments that were made many years earlier. *Cf. Cohen*, *supra* (denial of defendant's bond motion appealable because of danger of never recovering costs of suit); *Palmer*, *supra*, 806 F.2d at 1319 (allowing appeal because of "danger . . . that the fees would disappear into insolvent hands").

For these reasons, this Court should either grant certiorari and set the case for preliminary review or, alternatively, summarily reverse the decision below. In light of the clarity of the errors in the Tenth Circuit's approach, summary reversal is the preferable disposition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-1755
(D.C. No. CV-77-0721JB)
(D. N.M.)

DWIGHT DURAN, #26571; LONNIE DURAN, #26293; SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; ED MAHR, Secretary of Corrections; CHARLES BECKNELL, Secretary of Criminal Justice; LEVI ROMERO, Warden, PNM; ROBERT MONTOYA; JOSE LUJAN,
Defendants-Appellants.

[Filed Aug. 27, 1987]

ORDER AND JUDGMENT

Before MOORE and SETH, Circuit Judges, and ALLEY, District Judge.*

---

* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

This matter is before the court on plaintiffs' motion to dismiss this appeal for lack of jurisdiction.

Defendants have appealed from an order of the district court awarding plaintiffs interim attorney's fees for work performed in monitoring a court approved consent decree during the months of July and August, 1985. *See Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986).

This court has jurisdiction only over final orders of the district court. 28 U.S.C. § 1291. However, an order may be appealable even though not final if it fits within the "collateral order doctrine." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To be deemed final under the collateral order doctrine and thus immediately appealable, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Both parties admit that this order is not final. Defendants argue that it is appealable under the collateral order doctrine. The Supreme Court has held that a request for attorney's fees "raises legal issues collateral to the main cause of action—issues to which [Fed. R. Civ. P.] Rule 59(e) was never intended to apply." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). Contrary to defendants' arguments, however, this holding does not mean that *all* awards of attorney's fees are collateral and, therefore, immediately appealable.

This order does not meet the third prong of *Coopers & Lybrand*, 437 U.S. 463. Defendants have not shown that this interim award is "effectively unreviewable" after entry of the final award. *See in re Callister*, 673 F.2d 305 (10th Cir. 1982).

Defendants argue that this court has allowed prior appeals from an interim award of attorney's fees without questioning jurisdiction. *See Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Defendants have misread *Ramos*. Although the plaintiffs in *Ramos* submitted a request for interim attorney's fees to the district court, appeal to this court was taken from the district court's final award.

We hold that this order does not finally determine the claim for attorney's fees and is not immediately appealable.

The appeal is DISMISSED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 77-0721-JB

DWIGHT DURAN, *et al.*,
Plaintiffs,

v.

GARREY CARRUTHERS, *et al.*,
Defendants.

[Filed April 28, 1987]

ORDER

THIS MATTER having come on for consideration of Plaintiffs' Motion for an order directing the State of New Mexico to make payments to Plaintiffs' counsel in conformity with the Summary attached thereto, and the Court having reviewed the same, the Defendants' response thereto, and Plaintiffs' reply, with affidavits attached, the Court finds that a hearing thereon is unnecessary and finds as follows:

1. The Court has reviewed the affidavits of Plaintiffs' counsel in support of the professional services rendered and, further, has reviewed the services rendered and the time devoted thereto; that the activities, aimed at resolving major issues on modification of the Consent Decree as well as the monitoring required in connection with the allegations that Defendants were in non-compliance with the Consent Decree, are reasonable in time and amount.

2. Although Defendants expressed concern that the fees and expenses are unnecessary and unwarranted, Defendants have failed to specify with particularity claimed deficiencies and have made only generalized objections thereto.

3. The documentation submitted by Plaintiffs consistent with the procedures previously agreed to between the parties fully supports the claim for attorney fees.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants pay Plaintiffs' attorneys' fees and expenses for the period from July 1, 1985, through August 31, 1985, as follows:

DEATON & TWOHIG, LTD.		
Professional Services	$11,385.23	
Expenses	1,006.36	
	$12,391.59	$12,391.59
ROTHSTEIN, BAILEY, BENNETT, DALY & DONATELLI		
Professional Services	$25,125.42	
Expenses	2,019.78	
	$27,145.20	$27,145.20
PETER CUBRA		
Professional Services	$ 5,997.53	
Expenses	1,162.62	
	$ 7,160.15	$ 7,160.15
NATIONAL PRISON PROJECT		
Professional Services	$4,149.00	
Expenses	1,331.74	
	$ 5,480.74	$ 5,480.74
DWIGHT DURAN		
Professional Services	$ 2,150.13	
Expenses	61.60	
	$ 2,211.73	$ 2,211.73

DATED this 28th day of April, 1987.

/s/ [Illegible]
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—November 10, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Oliver Seth, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell Reece Tacha, and Honorable Bobby R. Baldock, Circuit Judges, United States Court of Appeals, and Honorable Wayne E. Alley, District Judge, United States District Court for the Western District of Oklahoma*

No. 87-1755

DWIGHT DURAN, #26571; LONNIE DURAN, #26293; SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,

Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; ED MAHR, Secretary of Corrections; CHARLES BECKNELL, Secretary of Criminal Justice; LEVI ROMERO, Warden, PNM; ROBERT MONTOYA; JOSE LUJAN,

Defendants-Appellants.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

---

* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. As of the date of the entry of the order appealed from, no final judgment had been entered by the district court. *See* 28 U.S.C. § 1291. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

Supreme Court, U.S.
F I L E D
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1325

DISTRIBUTED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; O. LANE McCOTTER; Secretary of Corrections; and ROBERT TANSEY, Warden, PNM,

Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293, SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,

Respondents.

On Appeal from the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 87-1325

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; O. LANE McCOTTER; Secretary of Corrections; and ROBERT TANSEY, Warden, PNM,

Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293, SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,

Respondents.

On Appeal from the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 22, Respondents respectfully submit this brief in opposition to the Petition for Certiorari filed by Petitioners. Respondents have no objection to Petitioners' statements as to the opinions below, jurisdiction and statutory provisions.

STATEMENT OF THE CASE

This class action lawsuit was filed against the official predecessors of the Petitioners herein in 1978 on behalf of all prisoners confined or who might be incarcerated in future at the Penitentiary of New Mexico ("PNM"). Plaintiffs asserted, inter alia, that overcrowding and the totality of conditions at PNM

violated their federal constitutional rights. In 1980, after extensive pretrial negotiations and proceedings, the parties presented a comprehensive settlement agreement to the court which contained mandatory and prohibitive injunctions concerning a wide range of conditions and practices at PNM and future medium and maximum security penal institutions opened by the State of New Mexico. By order dated July 14, 1980, the court approved the consent decree.

As the district court recently remarked in its unpublished Memorandum Opinion and Order denying Petitioners' Motion to Vacate portions of the consent decree, "[t]he litigation did not terminate with entry of the consent judgment and order. Since 1980, extensive activity has taken place within the litigation, including recurrent allegations by the plaintiff class of contumacious conduct on the part of the defendants." Duran, et al. v. Carruthers, et al., No. 77-0721-JB, slip op. at 5 (D. N.M. Feb. 11, 1988).

On April 28, 1987, the district court granted Respondents' motion for attorneys' fees and costs under 42 U.S.C. § 1988 for activities undertaken during July and August of 1985. Activities for which fees were sought and awarded included monitoring of the consent decree, and conducting negotiations with Petitioners concerning allegations of noncompliance and requests for modification of the decree being contemplated by Petitioners. See Pet. App. B. Subsequent to that award, the district court on May 11, 1987 awarded Respondents attorneys' fees for monitoring and related activities during September and October of 1985. Duran, et al. v. Carruthers, et al., No. 77-0721-JB, slip op. (D. N.M. May 11, 1987). Respondents have filed a motion for reconsideration of portions of the May 11, 1987 order, which is currently pending before the district court. Also pending before the district court are motions and applications for attorneys' fees

for the periods November, 1985 through June, 1986, and July, 1986 through May 1, 1987.

Petitioners timely appealed the district court's April 28, 1987 fee award to the Tenth Circuit. Respondents promptly moved to dismiss that appeal on the grounds that the fee award was interim in nature, and did not constitute a final, appealable order under 28 U.S.C. § 1291. Respondents pointed to the fact that the two subsequent fee applications pending before the district court involve closely related and ongoing monitoring and negotiation activities which, of necessity, must be viewed and considered in light of the April 28, 1987 award. Given those pending and related applications, the April 28, 1987 award could not be considered final because of the possibility that subsequent fee awards might modify the earlier award. In addition, on March 3, 1988, Respondents filed a Motion and Application for Attorneys' Fees and costs incurred in successfully defending against Petitioners' Motion to Vacate portions of the Consent Decree. Thus there are currently three fee applications pending before the trial court, as well as a motion to reconsider portions of the trial court's May 11, 1987 fee award.

Petitioners opposed the Motion to Dismiss Appeal on the grounds that the April 28, 1987 award was appealable under the collateral order doctrine announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Petitioners further relied upon the Supreme Court's determination in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), that requests for attorneys' fees raise legal issues collateral to the main cause of action.

A panel of the Tenth Circuit issued an unpublished opinion rejecting Petitioners' arguments, and noting that the holding in White does not render all attorneys' fee awards collateral and therefore appealable. See Pet. App. 2a. Rather, pursuant to the

Supreme Court's holding in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), a collateral order is immediately appealable only if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." Because Petitioners failed to demonstrate that the April 28, 1987 order was effectively unreviewable, as required by Coopers & Lybrand, and because the order did not finally determine the claim for attorneys' fees, the panel concluded that it was not immediately appealable and granted Respondents' Motion to Dismiss the appeal on August 27, 1987.

Petitioners sought rehearing by the panel and suggested the need for a rehearing en banc, arguing that the panel's treatment of the fee award as interim and unappealable could permanently insulate from appellate review all post-judgment awards attributable to monitoring or enforcement of previous judgments. On November 10, 1987, the panel denied Petitioners' request for rehearing on the merits, reasoning that as of the date of entry of the order appealed from, no final judgment had been entered by the district court. The suggestion for rehearing en banc was likewise denied on the same date.

ARGUMENT

Certiorari is wholly inappropriate in this cause and should be denied for three reasons. First, Petitioners' assertion that the Tenth Circuit's unpublished ruling is in conflict with the "prevailing rule" in seven other circuits, and contrary to the approach supported by recent Supreme Court decisions, is incorrect and misleading, inasmuch as none of the cases relied upon to support that proposition addressed the issue of the finality of the fee award being reviewed. Not only is the alleged "conflict" among the circuits non-existent in this case, the Tenth Circuit's unpublished decision reflects careful

consideration and proper application of applicable Supreme Court precedent. Moreover, because the Tenth Circuit's decision is unpublished, it has no precedential value and thus cannot conflict with any precedent that might exist in other circuits.

Second, Petitioners may be able to seek review of the order at issue in conjunction with and pendent to their inevitable appeal of the trial court's February 11, 1988 Memorandum Opinion and Order denying Petitioners' Motion to Vacate portions of the consent decree. And third, the issue presented for review is not sufficiently important to warrant discretionary review.

I. The allegedly "conflicting" decisions relied upon by Petitioners are inapposite.

Petitioners assert that the Tenth Circuit's ruling in the case at bar is in conflict with the "prevailing rule" in seven other circuits. The allegedly "conflicting" circuit court decisions cited at page 7 of the Petition to support that assertion are inapposite, inasmuch as the finality of the fee awards being reviewed therein was never questioned by the litigants and therefore never addressed the courts.[1] Because the finality issue was non-existent in those cases, the circuit courts involved applied no "rule," prevailing or otherwise, with respect thereto: there can be no "prevailing rule" applied in a case when the question has never been presented for determination.

---

[1]In only one of those seven cases was the question of jurisdiction even addressed. In Keith v. Volpe, 833 F.2d 850, 851 (9th Cir. 1987), the court stated, without any elaboration, that it had jurisdiction to consider the appeal under 28 U.S.C. § 1291. Inasmuch as there was no discussion in that case of the appealability of the fee award being reviewed therein, the decision hardly constitutes governing precedent on the question of whether interim fee awards for monitoring and implementation of consent decrees are immediately and automatically appealable. Further, as discussed infra, even if the Keith decision constitutes valid precedent for that proposition--which it clearly does not--the unpublished opinion in the case at bar has no precedential value, and thus cannot and does not conflict therewith.

Petitioners further assert that this Court's recent decisions in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) and 107 S.Ct. 3078 (1986), implicitly support the immediate appealability of post-judgment fee awards. Neither the litigants, the trial court nor the appellate courts in the Delaware Valley litigaiton questioned the finality of the fee award at issue in that case. There was no question, express or implied, as to the immediate appealability of that award, and thus the Delaware Valley decisions, like the allegedly "conflicting" circuit court decisions cited by Petitioners, are inapposite.

Moreover, as Petitioners readily concede at page 13 of their Petition, there can be no conflict among governing precedents in the circuits where, as in the case at bar, the decision at issue is unpublished. Pursuant to U.S. Ct. of App. Tenth Cir. R. 36.3, an unpublished opinion has no precedential value except for the limited purposes of establishing doctrines such as the law of the case, res judicata, or collateral estoppel. Thus, even if the cases relied upon by Petitioners were applicable to the issue before this Court--which they clearly are not--the Tenth Circuit's unpublished decision would not constitute conflicting precedent.

Finally, not only is the alleged "conflict" among the circuits non-existent in this case, the Tenth Circuit's decision reflects careful consideration and proper application of the principles set forth by this Court in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The Tenth Circuit gave full consideration to the issue before it, in light of existing and applicable precedent, and decided that issue correctly.

II. Petitioners may be able to seek review of the order at issue in conjunction with and pendent to their inevitable appeal of the trial court's February 11, 1988 Memorandum Opinion and Order denying their Motion to Vacate portions of the Consent Decree.

On February 11, 1988, the district court issued a Memorandum Opinion and Order denying Petitioners' Motion to Vacate portions of the Consent Decree, a copy of which is attached hereto as Appendix 1. Although Petitioners have not yet filed a notice of appeal from that decision, given the import of that ruling, appeal thereof by Petitioners is inevitable. The February 11, 1988 decision is clearly and properly appealable under 28 U.S.C. § 1292(a), and thus there will be no question of the Tenth Circuit's jurisdiction to consider that appeal.

Under the doctrine of pendent appellate jurisdiction, when a circuit court of appeals assumes jurisdiction over an issue properly before it, it may, in its discretion, consider otherwise nonappealable issues in the case, where there is sufficient overlap in factors relevant to the appealable and non-appealable issues to warrant the exercise of such plenary authority over the appeal. San Filippo v. U.S. Trust Company of New York, Inc., 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc., 560 F.2d 1325, 1335 (7th Cir. 1977), cert. denied, 434 U.S. 1070 (1978). And see, Parks v. Pavkovic, 753 F.2d 1397, 1402 (7th Cir.), cert. denied sub nom Belletire v. Parks, 473 U.S. 906 (1985), cert. denied sub nom Parks v. Belletire, 474 U.S. 918 (1985) ("When an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration to a subsequent appeal."). Cf. Kershner v. Mazurkiewicz, 670 F.2d 440 (3rd Cir. 1982) (advocating a more restrictive approach to pendent appellate jurisdiction).

Petitioners' contention that the April 28, 1987 fee award is effectively unreviewable ignores the doctrine of pendent appellate jurisdiction, and the possibility that the Tenth Circuit could and would entertain review thereof pendent to review of the trial court's February 11, 1988 Memorandum Opinion and Order denying Petitioners' Motion to Vacate portions of the Consent Decree. Inasmuch as portions of the April 28, 1987 fee award concerned negotiations regarding modifications to the Consent Decree being contemplated by Petitioners, there is sufficient overlap of issues between the fee award and the February 11, 1988 order to justify exercise by the Tenth Circuit of pendent jurisdiction over the fee award.

Petitioners' contention that the April 28, 1987 fee award is effectively unreviewable also ignores the inevitable conclusion of this litigation. Even if the Tenth Circuit were to decline to exercise pendent appellate jurisdiction over the April 28, 1987 award, it is inevitable that this lawsuit will eventually draw to conclusion, at which time all previously nonappealable orders will merge with the final judgment and become reviewable. See e.g., Hellerstein v. Mr. Steak, Inc., 531 F.2d 470, 474 (10th Cir.), cert. denied, 429 U.S. 823 (1976) ("The general rule is that an interlocutory order from which no appeal lies is merged into the final judgment and open to review on appeal from that judgment.").

III. The issue presented for review is not sufficiently important to warrant discretionary review.

A writ of certiorari is not a matter of right, but rather of sound judicial discretion, and should be granted only when "there are special and important reasons therefor." Sup. Ct. R. 17. As expressed by this Court in National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951), certiorari is appropriate only "'in cases involving principles the settlement

of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" (quoting Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)).

As discussed above, the "conflict" among the circuits in this case is non-existent. That fact, as well as the insignificance of the question presented herein, is underscored by the Tenth Circuit's decision not to publish the order at issue in this case. As discussed above, Tenth Cir. Rule 36.3 states that an unpublished opinion has no precedential value, and shall not be cited or used by any court within the Tenth Circuit except for the limited purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

Because the Tenth Circuit's opinion has no precedential value, the issue addressed therein has no import for anyone other than the parties to this lawsuit. This case simply does not present the type of special and important issue that the discretionary measure of certiorari is intended to address.

CONCLUSION

Respondents respectfully submit that Petitioners have failed to sustain their burden under Supreme Court Rule 17 of establishing that there are special and important reasons why a writ of certiorari should be granted in this matter. The "conflicting" circuit court decisions cited by Petitioners are inapposite; the Tenth Circuit's decision is consistent with and a proper application of Supreme Court precedent; under the doctrine of pendent appellate jurisdiction, the Petitioners may be able to seek proper review of the order at issue when they appeal the trial court's February 11, 1988 Memorandum Opinion and Order; and the unpublished opinion below has no precedential value or import for anyone other than the parties to this lawsuit. This case is

therefore singularly unworthy of Supreme Court review, and the Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN, et al.,

Plaintiffs,

v. Civil No. 77-0721-JB

GARREY CARRUTHERS, et al.,

Defendants.

COPY

MEMORANDUM OPINION AND ORDER

The defendants in the above-captioned civil action have filed a motion seeking to vacate portions of the consent decree approved and entered by this Court in 1980.[1] As stated in their brief in support of the motion to vacate, "[d]efendants' fundamental contention is that portions of the 1980 decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court." Defendants' brief, p. 2. The defendants' motion relies on the eleventh amendment, and related considerations of comity. The motion has been extensively briefed by the parties, and has been given prolonged and careful attention by the Court. Ultimately, as demonstrated in this Memorandum Opinion, the motion rests on the incorrect and

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1 The entire consent decree was approved and entered on July 14, 1980. Certain portions of the decree, relating to correspondence, public and attorney visitation, food service, legal access, and visiting, were submitted to the Court in 1979, and were approved at various times during that year.

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APPENDIX 1

unsupported conception of the nature of the eleventh amendment immunity, and a misapplication of the principle of comity. Although this memorandum may seem prosaic and somewhat pedantic, for which the Court apologizes, it is necessary in order to meet the extravagant contentions of defendants.

I. PLAINTIFFS' FIRST AMENDED COMPLAINT.

On July 6, 1978, the plaintiff class, through counsel, filed its first amended complaint. The complaint alleges that "the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-being, and results in the physical and mental deterioration and debilitation of the persons confined therein which is both unnecessary and penologically unjustifiable." First Amended Complaint, ¶ 1.[2] This general allegation is elaborated upon by extensive factual allegations dealing with a wide range of conditions and practices alleged to be in place at the Penitentiary of New Mexico. First Amended Complaint, ¶¶ 15-32.

Following this elaboration, the first amended complaint sets forth four claims for relief: first, a claim that the

---

[2] At the time the first amended complaint was filed, the class definition was limited to all prisoners who are or will be confined in the Penitentiary of New Mexico, the only prison in the state other than those confined in minimum security facilities, who are not part of the class. The Court's July 14, 1980, order approving the comprehensive consent decree expanded the class, "by agreement of the parties ... to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for operation by the State of New Mexico after June 12, 1980."

totality of the conditions, alleged in the complaint, violates the federal constitutional rights of the plaintiff class secured by the first, fourth, fifth, sixth, eighth, ninth and fourteenth amendments of the United States Constitution; the second and third claims for relief are based on state constitutional and statutory law;[3] the fourth claim for relief is predicated on the assertion that the plaintiff class is a third-party beneficiary of a contractual arrangement between the defendants and the United States Law Enforcement Assistance Administration, pursuant to 49 U.S.C. § 3750.

II. THE 1980 CONSENT DECREE AND ORDER.

After extensive pretrial proceedings and negotiations, the parties presented to the Court a comprehensive settlement document entitled Agreement, to which was attached a series of documents labeled policy statements relating to various substantive areas of prison operations. This voluminous document contains mandatory and prohibitive injunctions, often of great specificity, relating to a broad range of conditions and practices at the Penitentiary of New Mexico.[4]

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[3] The Court's jurisdiction over the state constitutional and statutory law claims was posited on principles of pendent jurisdiction.

[4] The subjects of the consent decree are correspondence, public and attorney visitation, food service, legal access, visitation, classification, living conditions, inmate activity, medical care, mental health care, staffing and training maximum security and inmate discipline. Critically, each of these areas relates to one or more of the factual allegations set out in the first amended complaint, and incorporated into the first claim for relief, predicated on rights secured by the United States Constitution. First Amended Complaint, ¶¶ 15-32 (factual allegations) and ¶¶ 33-34 (First Claim for Relief). The precise correlation of the portions of the consent decree and the paragraphs of the first amended complaint is analyzed in n. 21, below.

By an order dated July 14, 1980, the Court, finding that the agreement represented a compromised settlement of the disputes between the parties, provisionally approved the comprehensive consent judgment. The July 14 order, which itself was entered by consent, includes standard prefatory language by which the Court acknowledged that the defendants disavowed liability and that the parties agreed to limit the admissibility of the document.

Paragraph 2 of the July 14 order states that the consent decree "may include specific requirements and procedures beyond what is required by the Constitution of the United States." The order provides further for redefinition of the plaintiff class "to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close or medium security facility opened for operation by the state of New Mexico after June 12, 1980."

Finally, the July 14 order directed that notice of the order and settlement be provided to all members of the class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The July 14 order stated that the Court had examined the agreement and found that it represented a compromise settlement of the disputes of the parties. Following that review, under Rule 23, the Court gave tentative approval of the decree, stating that its approval was "provisional until fifteen (15) days after said notice." The order was to "become final if not rejected [by the Court] or modified by agreement of the parties based upon said objections [from the plaintiff class] within thirty (30) days."

Pursuant to that provision, the objection process commenced. Two objections from the plaintiff class were submitted to the Clerk, as mandated by the class notice, but neither objection was sufficient to provoke the Court's rejection of the consent judgment. In the absence of a motion from the parties to modify the judgment, the July 14 order, approving the consent decree and adopting it as an order of the Court, became final.

III. PROCEEDINGS SINCE ENTRY OF THE CONSENT DECREE.

The litigation did not terminate with entry of the consent judgment and order. Since 1980, extensive activity has taken place within the litigation, including recurrent allegations by the plaintiff class of contumacious conduct on the part of the defendants. In 1983, with the agreement of the parties, the Court appointed a special master and a deputy special master, pursuant to Rule 53, Fed. R. Civ. P., to monitor the state of the defendants' compliance with all remedial orders entered in this cause. Order of Reference, June 3, 1983. Since that time, the special master has filed twenty reports on defendants' state of compliance, totaling more than 2,000 pages setting forth findings of fact as to the state of defendants' compliance, as well as a volume of over 700 separate findings of fact relating to the state of defendants' compliance as of early 1986. Those reports have provided a factual basis for the entry of numerous orders by the Court approving the special master's findings. Additionally, the parties have entered into several stipulations provoked by the findings of the special master and the orders of the Court.

Because of the fundamental jurisdictional claim raised in defendants' motion to vacate, this history is not relevant to the Court's consideration of that motion. It serves to show, however, that it has provided the Court with a vast factual record in this case which has informed the Court's evaluation of the consent decree in determining the federal constitutional rights of the plaintiff class and the scope of equitable relief required to redress deprivation of those rights.

IV. DEFENDANTS' MOTION TO VACATE.

A. Prior Motions

On June 12, 1987, the defendants filed their motion to vacate portions of the 1980 decree. At the time this motion was filed, defendants' motion to modify the decree, and plaintiffs' motion seeking a finding of contempt against defendants, both of which were filed in December 1985, were pending before the Court. For the purpose of those pending motions, the Court had compiled, through the efforts of the special master, an extensive factual record describing defendants' state of compliance, as of 1986, with the outstanding remedial orders.[5] Additionally, in December 1986, the Court heard extensive testimony relating to the parties' December 1985 motions.

While the 1985 motions were pending decision, defendants filed, on February 6, 1987, a motion seeking to modify a single provision of the consent decree requiring single-celling at all institutions subject to the orders in this case. Then, while it

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[5] The process by which that record was described is set out in the Court's order of January 10, 1986.

was pending, defendants gave notice of their intent to withdraw, without prejudice, the February 6, 1987, motion to modify. Withdrawal of that motion was granted in the Court's order of June 4, 1987. The defendants, by letter to the Court, suggested that the Court withhold ruling on the pending motions to modify the remedial decree until the defendants could file a different, broader motion. Presumably, the instant motion to vacate, filed June 12, is that motion.

B. The June 12, 1987 Motion to Vacate

The defendants' motion to vacate seeks to modify the 1980 decree by eliminating from it all provisions that, in the view of the defendants, are not based on federal law, or which cannot be construed plausibly as remedial measures designed to correct federal constitutional violations. The defendants contend that the eleventh amendment to the United States Constitution and derivative considerations of comity require elimination from the decree of any provisions that do not enforce federal rights.

The defendants essentially contend that "portions of the 1980 consent decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court." This argument has two essential threads: first, that federal courts do not have authority to enter orders against states, or against state officials acting in their official capacity, except to vindicate federal rights; and second, that in entering orders designed to vindicate federal rights, federal courts are constrained to limit those orders to measures required to protect those federal rights. The first is based on the principle of

sovereign immunity embodied in the eleventh amendment to the United States Constitution. The second is based on judicially created considerations of federalism and comity which, in defendants' view, are implicit in, or at least derivative from, the eleventh amendment principle.

Defendants' motion to vacate ultimately raises questions regarding the nature of the eleventh amendment immunity afforded to states and state officials and the relationship of that immunity to causes of action and remedial relief. Additionally, defendants' motion asserts that the judicially created doctrine of comity is rooted in the eleventh amendment and embodies constraints on the exercise of jurisdiction over causes of action.

Full and fair assessment of these complex, detailed arguments requires a careful analysis of the eleventh amendment, sovereign immunity, the nature of federal constitutional rights, the jurisdiction of federal courts over causes of action based on state rights, the nature of comity as a restraint on jurisdiction and/or relief, and the effect of these considerations when the Court enters a judgment by consent rather than a judgment following an adversary adjudication.

V. THE ELEVENTH AMENDMENT, SOVEREIGN IMMUNITY, AND FEDERAL JURISDICTION.

A. The Eleventh Amendment, Sovereign Immunity -- Federal Rights

The eleventh amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State.

Although its language is to the contrary, the amendment has been construed to prohibit suits against a state brought by its own citizens as well as those brought by citizens of another state. Hans v. Louisiana, 134 U.S. 1 (1890).[6] It is established, then, that the eleventh amendment shields the states from suit even

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[6] There is considerable disharmony among the current members of the United States Supreme Court as to the validity of the holding in Hans. Justices Brennan, Marshall, Blackmun and Stevens have expressed their opinion that Hans v. Louisiana, and the derivative holding in Edelman v. Jordan, 415 U.S. 651 (1974), "cannot be reconciled with the federal system envisioned by [the Constitution]." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 303 (1985) (Justice Blackmun, joined by Justices Marshall, Brennan and Stevens, dissenting).

Justice Scalia has expressed his view that "the correctness of Hans as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, [are] complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters." Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. ___, 97 L. Ed. 2d 389, 411 (1987) (Justice Scalia concurring in part and concurring in the judgment).

Notwithstanding the possible infirmity of Hans, its holding must be, and is, fully accepted for purposes of the present discussion.

when state actions are alleged to be in violation of the United States Constitution.

That doctrine, by its terms, undermines the supremacy of federal law and is therefore in derogation of the supremacy clause of the United States Constitution. Art. VI, § 2. The Supreme Court avoided this unacceptable result by its essential ruling in Ex Parte Young, 209 U.S. 123 (1908). In Young, the Court held that the eleventh amendment does not bar an action against a state official alleging that the official's conduct violated the United States Constitution. In order to redeem the holding in Young, and thereby secure the supremacy of federal law, the Supreme Court developed a now-famous analytical form: when the official actions of a state official come into conflict with the superior authority of the United States Constitution, the officer "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Ex parte Young, supra at 159-60.[7]

The legal precept of Ex Parte Young is this: a state inherently lacks the authority to authorize one of its officers to act in a manner that violates the United States Constitution.

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[7] The obvious paradox of this construct -- that such actions by state officials are "state action" for purposes of the fourteenth amendment but not for purposes of the eleventh amendment -- has been recognized by the Court, but has not undermined the vitality of the principle. See Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982).

Therefore, any officer acting in violation of the United States Constitution is acting ultra vires. In so acting, the state official forfeits his representative character, and loses the sovereign immunity that, under the eleventh amendment, shields official state action from challenge in federal court. In other words, Ex Parte Young approves equitable actions against state officials in their individual capacities for violations of constitutional rights, the eleventh amendment notwithstanding. Thus, Ex Parte Young enables plaintiffs to allege "state action" sufficient to trigger the fourteenth amendment without automatically raising the bar of the eleventh amendment.[8]

It is not always easy to determine when an action in federal court is against the state, and therefore barred by the eleventh amendment, and when it is against state officials acting in contravention of federal rights and therefore outside the shield of the eleventh amendment. But, the Court need not explore the nuances of that inquiry for purposes of addressing the present issue. It is sufficient to observe that equitable actions against state officials, seeking prospective injunctive relief to correct federal constitutional deprivations, are permissible.[9]

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[8] This principle is further elucidated in Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) which establishes the fourteenth amendment as a substantive rule of conduct binding on state officials individually regardless of whether or not the state has officially sanctioned their actions.

[9] Actions of this kind are not barred by the eleventh amendment even if they will have a significant effect on the state treasury. Edelman v. Jordan, supra at 660-73. "Such an ancillary effect on otherwise sovereign affairs of the state is a permissible and often inevitable consequence of the principle announced in Ex Parte Young." Id. at 668.

B. **The Eleventh Amendment and Sovereign Immunity -- State Rights in Federal Court.**

The rationale that supports Ex Parte Young -- vindication of the supremacy of federal rights -- does not apply to actions in federal court in which plaintiffs seek vindication of rights based on state law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), presented the question of "whether a federal court may award injunctive relief against state officials on the basis of state law." 465 U.S. at 91.[10] The Court answered the question in the negative, noting that

> [i]n such a case the entire basis for the doctrine of Young and Edelman disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. We conclude that Young and Edelman are inapplicable in a suit against state officials on the basis of state law.

465 U.S. at 106.

The holding in Pennhurst is simply stated: the eleventh amendment prohibits a federal court from awarding injunctive relief against state officials on the basis of state law.[11]

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[10] The state law claims in Pennhurst were pendant to federal constitutional and statutory claims. After holding that the eleventh amendment prohibits injunctive relief against state officials based on state law, the Court in Pennhurst assessed the effect of the principle on federal court pendant jurisdiction. The Court held that pendent jurisdiction does not overcome the bar of the eleventh amendment, noting that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state law claims brought into federal court under pendent jurisdiction." 465 U.S. at 121.

[11] Defendants extrapolate from Pennhurst three significant principles:

> 1. An extension of federal judicial power cannot be predicated on violation of state law. (This formulation is, of course, overly broad. The holding in Pennhurst is that the eleventh amendment proscribes the

VI. THE SCOPE OF REMEDIAL POWER -- COMITY AND EQUITABLE DISCRETION.

The preceding section discussed limitations arising from the eleventh amendment on the power of federal courts to assume jurisdiction over suits involving causes of action based on (a) federal or (b) state law. The constitutional constraints operate at the most fundamental level to deprive federal courts of authority, ab initio, to take cognizance of legal claims. Apart from these doctrines, other considerations, arguably implicit in the constitutional scheme but ultimately creations of wise judicial policy, restrain federal judicial action in the determination of remedies. These principles operate after the threshold question of federal jurisdiction has been answered in the affirmative and a deprivation of federal rights has been found to exist. The most common term for this principle of restraint is comity.

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exercise of federal judicial power against states on the basis of a state's own law. There is nothing in Pennhurst to suggest that other forms of pendent jurisdiction are unconstitutional.)

2. There is a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by a state of its immunity from excessive federal decrees. (This is an unsupported conclusion; the error, which is at the heart of defendants' argument, is discussed at length in Section VIII, below.)

3. The eleventh amendment creates a jurisdictional limitation on federal judicial power, thereby rendering decrees entered in violation of that limitation void. (This principle as stated is correct, but is inapplicable to the present case for reasons discussed at length in this memorandum.)

See Defendant's brief, p. 12.

One is hard-pressed to define comity, although the concept pervades contemporary jurisprudence, particularly in the area of institutional reform litigation. The essence of comity is restraint, both in adjudicating matters and in imposing remedies. First, comity requires that federal courts be reluctant to scrutinize the operations of state institutions in search of federal constitutional infirmities. Second, faced with proof of a violation of federal rights, federal courts should intervene only to the extent required to vindicate those rights. In doing so, federal courts should not "impose upon [governmental agencies] their views of what constitutes wise economic or social policy." Dandridge v. Williams, 397 U.S. 471, 486 (1971).[12]

These considerations of restraint in no way vitiate the fundamental constitutional tenet that federal courts are empowered to vindicate federal rights, notwithstanding sovereign immunity or judicial restraint. Defendants' ignore the distinction in the comity principle between restraint in adjudicating claims and restraint in formulating remedies, a critical distinction explicitly acknowledged in the authorities relied upon by the defendants. For example, in their brief, the

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12 Defendants correctly point out that the "principle of restraint is derived from several interrelated concerns." Defendants' brief p. 4. First, the principle of separation of powers cautions against the usurpation, by the judiciary, of functions properly charged to the legislative and executive branches of the government. Bell v. Wolfish, 441 U.S. 520, 548 (1979); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). Apart from this general principle, practical restraints dictate that the judiciary should be loath to assume the task of restructuring the operations of state government. Particularly where the daily operation of a corrections facility is in question, the judiciary should not lightly assume responsibility for making the day-to-day decisions that require a closer familiarity with the institution than is possessed by the court. See generally Bell v. Wolfish, supra at 547; Procunier v. Martinez, supra at 405.

defendants cite Smith v. Sullivan, 611 F.2d 1039, 1045 (5th Cir. 1980), for the proposition that "courts ... may not become enmeshed in the minutiae of prison operations" (internal citations omitted). In Smith, however, the quoted passage is immediately preceded by the obvious qualification, "unless acting to remedy federal constitutional violations as part of a totality approach." Id.

Defendants also rely on Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983), cert. dismissed, Meachum v. Battle, 465 U.S. 1014 (1984), as authority for the related but separate strands of their comity argument -- separation of powers and pragmatic restraint. See Defendants' brief, p. 6.[13] In Battle, however, the Court of Appeals for the Tenth Circuit analyzed comity principles precisely as the Court does here. Recognizing the "reluctance of federal courts to intervene in matters of prison administration," the court of appeals nonetheless approved the district court's conclusion that the principle of comity "was not a justifiable basis for failure to take cognizance of valid federal constitutional claims relating to rights secured to inmates by the federal Constitution and the laws of the United States." 564 F.2d at 392, citing Procunier v. Martinez, supra at

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[13] Throughout their brief, defendants entwine the concept of comity with that of separation of powers. For example, defendants quote the Supreme Court's opinion in Bell v. Wolfish, noting that intrusive judicial decrees usurp the role preserved under our constitutional system for the "legislative and executive branches of our government, not the judicial." 441 U.S. at 548. Separation of powers arguments have no role, however, where properly named defendants are charged with violations of federal rights and are held accountable for those violations by injunctions that mandate specific measures designed to reinstate and protect constitutional rights.

817, Cruz v. Beto, 405 U.S. 319 (1972), and Johnson v. Avery, 393 U.S. 483 (1969).

Defendants also rely on a subsequent opinion in Battle v. Anderson, 708 F.2d at 1523, and quote from that opinion an article from the Harvard Law Review by Professor Owen Fiss. Again, the matter is taken out of context, and ignores the holding of the court. In fact, the 1983 Battle opinion sets out simply and explicitly a doctrine of equitable judicial power that serves to counterbalance, and ultimately overcome, whatever limitations might be generated by the principle of comity. The court observes that "the court, in exercising continuing jurisdiction to achieve structural reform, cannot terminate its jurisdiction until it has eliminated the constitutional violation 'root and branch'." 708 F.2d at 1538, citing Green v. County School Board, 391 U.S. 430, 438 (1968). Thus, the Court of Appeals for the Tenth Circuit has directly applied to institutional reform litigation the vital principle that a federal court's equitable powers are inherently sufficiently broad to allow federal courts to fashion effective injunctive relief to cure federal constitutional violations. The nature of the remedy for deprivation of federal constitutional rights is determined by the nature and scope of the constitutional violation. Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1, 16 (1971). Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. Green v.

County School Board, supra; Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).[14]

The principles of equitable breadth and flexibility are at some tension with the doctrine of comity. This tension, however, is superficial; ultimately the doctrines are consistent. The preservation of the supremacy of federal law that animated Ex Parte Young serves as well to reconcile the facial inconsistency of these doctrines. First, Ex Parte Young makes clear that federal courts are authorized to vindicate federal rights, the principle of sovereign immunity notwithstanding. Second, where federal constitutional rights have been traduced, principles of restraint, including comity, separation of powers and pragmatic caution, dissolve; federal courts are empowered and required to design equitable remedies that are effective to cure constitutional violations. In this tailoring of remedies, of course, the preferred course is to preserve as much discretion for state administrators as possible. Yet, where constitutional rights have been violated, comity does not require, or even permit, a federal court to countenance those violations. It thus is clear that in

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[14] It is worth noting that the holding in Milliken II followed the Supreme Court's holding in Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974), where the Court noted that the Court's equitable remedy must be related to "the condition that offends the Constitution." 418 U.S. at 738. Milliken I and Milliken II therefore establish the fundamental principle that a remedial decree entered to correct constitutional violations must be designed as nearly as possible to correct the constitutional violation and to restore the victims of unconstitutional conduct to the position they would have occupied in the absence of such conduct. This formulation is merely a more elaborate restatement of the principle embraced by the court of appeals in Battle v. Anderson that constitutional violations must be eliminated "root and branch." 708 F.2d at 1538.

entering remedial decrees, such decrees should be (a) designed to be effective, (b) tailored to the constitutional violations, and (c) fashioned to restore victims to their positions before the constitutional violations. See n. 14, above. In guaranteeing that federal injunctions will be effective within these parameters, however, federal courts should be mindful of state sovereignty and should intrude as little as necessary on state prerogatives.

Thus, it is apparent that, whatever restraints are imposed by comity considerations, these limitations are not jurisdictional. Since there is no jurisdictional bar to a court's evaluating claims of federal constitutional violation, even in a setting as delicate as that involving the operations of a state institution, the consequent limitations on a court's assessment of a consent decree presented to the court by the parties, are not jurisdictional. Indeed, when a remedy has been fashioned with the participation and consent of the state, and that remedy is presented to the court, the role of judicial restraint is problematic. In such a situation, it is the prison administrators themselves who are proposing the remedy. Absent a limitation on assuming jurisdiction over the proposed remedy, the court must make two inquiries: first, is the remedy sufficient to protect the interests of the plaintiff class? (This inquiry is mandated by Rule 23 of the Federal Rules of Civil Procedure.) Second, is the relief illegal? Local No. 93 (Firefighters) v. City of Cleveland, 478 U.S. ___, 92 L. Ed. 2d 405 (1986) (a federal court may enter a consent decree that provides relief

greater than the court might have awarded after trial, unless the relief is illegal).

VII. PRELIMINARY CONCLUSIONS OF LAW.

Before undertaking a discussion of the weaknesses in defendants' jurisdictional argument, certain fundamental principles, derived from the foregoing discussion, should be set out.

1. The eleventh amendment bars a suit of any kind against a state in its own name. Hans v. Louisiana, supra.

2. The eleventh amendment bars a suit against a state official when the suit, in essence, is one that would operate against the state. Edelman v. Jordan, supra.

3. The eleventh amendment bars a suit against the state official seeking injunctive relief based on state law. Pennhurst State School & Hospital v. Halderman, supra.

4. The eleventh amendment does not bar a suit against a state official seeking injunctive relief, alleging that the state official has violated federal law and seeking only prospective relief. Ex Parte Young, supra.

5. In fashioning a remedy for constitutional violations, the court should tailor its remedy to constitutional violations, yet insure that the remedy effectively cures the constitutional violations and restores the victims to their positions before the constitutional violation. Swann v. Charlotte Mecklenberg, supra; Green v. County School Board, supra; Battle v. Anderson, supra.

VIII. DISCUSSION.

Defendants' argument rests on a fundamental confusion and misapplication of two principles: the jurisdictional limitations derived from the eleventh amendment, and the equitable considerations derived from the principle of comity.

Plaintiffs' first amended complaint, as observed previously, set forth extensive factual allegations, relating to virtually every facet of the operation of the Penitentiary of New Mexico. Plaintiffs' first claim for relief alleged that, on whole, the factual conditions at the Penitentiary of New Mexico deprived the plaintiff class of rights secured by the United States Constitution. As a threshold matter, then, federal jurisdiction over the civil action existed by virtue of 28 U.S.C. §§ 1331 and 1343(3).

As a matter of fundamental due process, the defendants had the right to challenge the factual allegations set out in the complaint and thereby put the plaintiffs to their proof. Through the adjudicative process, defendants had the right to challenge the conclusion of law that the conditions alleged and proved by the plaintiffs, viewed in their totality, violated the constitutional rights of the plaintiff class. By agreeing to the entry of a consent judgment, however, the defendants waived their right to trial on the factual allegations and adjudication of the legal conclusion. See generally Swift & Co. v. United States, 276 U.S. 311, 316 (1928); Local No. 93 (Firefighters) v. City of Cleveland, supra.

Following the waiver of the right to proof of violation, the next step in the process of adjudication became the fashioning of appropriate remedies. The parties presented to the Court an agreed remedial order. In doing so, the defendants waived their rights to the restraints of comity in the selection of equitable remedies.[15] Indeed, judicial application of such restraints in the face of a remedy proposed by the defendants would be anomalous. Faced with a proposed consent decree, setting out relief that is the product of agreement of the parties, the Court is under an obligation to address only three issues:

First, is the complaint, which serves as the sole judicial cognizable basis for jurisdiction, sufficient to invoke federal jurisdiction? That inquiry is easily satisfied, as set out above.

Second, is the relief illegal? Nothing in the consent decree requires action, or refraining from action, on the part of state officials in a manner that would violate the law. Thus, the consent decree does not violate the principle established by the United States Supreme Court in Local No. 93 v. City of Cleveland, supra.

Third, is the relief adequate to protect the interest of the plaintiff class? As discussed in section II, above, this inquiry, governed by Rule 23, Fed. R. Civ. P., was conducted and

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15 This is not to suggest that the defendants waived eleventh amendment limitations. As set out in this order, because of the federal basis for the plaintiffs' claims for relief, those limitations were not at issue in this action.

the Court's conclusion is supported. Thus, the Court, in exercising power over a civil action that properly invoked federal jurisdiction, approved a remedial order the content of which was the product of free, unhindered, plenary negotiations between the parties.

The defendants' motion to vacate portions of the order is based on the assertion that, notwithstanding the existence of a complaint properly invoking federal jurisdiction and the proper entry of a lawful consent decree, any portions of the consent judgment that are not grounded in federal law, or that cannot plausibly be viewed as remedies for federal violations, are void as a matter of jurisdiction. This legal position involves two distinct errors.[16]

Defendants construe Pennhurst as holding that "the Eleventh Amendment deprives a federal court of the power to award any relief, injunctive or otherwise, against state officials sued in their official capacity, except where that relief is premised on federal law. Defendants' brief, p. 11. This construction of Pennhurst is entirely accurate. Defendants' argument from

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16 Another fundamental error — the discussion of waiver — is also at the heart of defendants' position. Because this issue is irrelevant, it will not be treated in the text. The discussion of waiver in defendants' brief contends that any waiver of the state's sovereign immunity was unauthorized as a matter of law, and therefore is ineffective, at least as a constraint on the conduct of successor officials. As demonstrated in the text, the state defendants named in the first amended complaint were not protected from the allegations of that complaint by virtue of sovereign immunity. The complaint alleges federal constitutional violations and seeks injunctive relief to correct those violations. In the face of such allegations, and a federal cause of action structured in the manner of the first amended complaint, state officials, properly named, do not enjoy sovereign immunity. Accordingly, the question of waiver of sovereign immunity did not arise in this proceeding. Rather, the relevant waivers were of proof of constitutional violation and of comity-based constraints in the form of equitable relief.

Pennhurst, however, transmutes the pronounced principle into a limitation on remedy. This distortion is a fundamental error which undermines defendants' argument. Careful analysis of Pennhurst demonstrates that the eleventh amendment immunity identified and applied in that case is a product of the cause of action alleged by the Pennhurst plaintiffs and relied upon by the Court as a predicate for relief. This critical fact, which is ignored by defendants, is demonstrated unequivocally at several places in the opinion. The Court stated the question before it to be "whether the claim that petitioners violated state law in carrying out their official duties at Pennhurst is one against the state and therefore barred by the Eleventh Amendment." 465 U.S. at 103 (emphasis in original). The Pennhurst Court concluded "that Young and Edelman are inapplicable in a suit against state officials on the basis of state law." Id. at 106. Finally, the Court described its holding to be that "federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of this state law." Id. at 124-25. The clear implication of Pennhurst, however, is that entry of relief would be appropriate if necessary to vindicate the supremacy of federal law.

Defendants also ignore the connection of the holding in Pennhurst to the cause of action upon which the district court predicated its award of injunctive relief. Moreover, their characterization of Pennhurst as a limitation on the scope of relief in the face of federal violation is unsupported. Indeed, since Pennhurst involved no proof of federal violation, any

interpretation of Pennhurst as a limitation on relief for violations of federal law is unwarranted.

The mischaracterization of Pennhurst is most clearly revealed on page 12 of defendants' brief, where they assert that "Pennhurst recognized a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by the state of its immunity from excessive federal decrees." This assertion is puzzling, for at least two reasons. First, the Supreme Court specifically announced that it did not need to reach the issue of comity, because it found "the Eleventh Amendment challenge dispositive." 465 U.S. at 97. Second, Pennhurst had nothing to do with a consent decree, and contains no statement whatever as to the limitation on remedies agreed to by consent. This critical component of defendants' argument from Pennhurst is, in fact, unsupported by that case.

Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir. 1987), similarly does not support defendants' argument. In Lelsz, the court of appeals reviewed an order entered to enforce provisions of a consent decree that had been entered two years earlier. The underlying action raised federal constitutional and state law claims relating to treatment of the plaintiff class which was comprised of mentally retarded patients housed in state schools. The consent decree approved by the court consisted of numerous provisions relating to treatment of the mentally retarded. Slightly more than one and one-half years after entry of the consent decree, the plaintiffs filed a motion

for community placement, alleging that the transfer of members of the plaintiff class to community facilities was necessary to achieve compliance with the consent decree. Following a hearing on the motion, the court entered an order directing transfer to community centers. That order was appealed and is the subject of the opinion in Lelsz.

The court of appeals vacated the enforcement order. The court noted first that the order approving the underlying consent decree "painstakingly illicits the constitutional or statutory basis for relief afforded in every significant paragraph of the [consent decree]. That order readily demonstrates that any rights the class members may have with regard to community placement were understood by the district court to originate in, and do in fact exist in, state law." 807 F.2d at 1247.[17] This conclusion required the court of appeals, pursuant to Pennhurst, to conclude that the relief granted was grounded solely on state law.[18]

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17 The court concluded on the basis of a clear record, that the relief in the consent decree was predicated solely on state law. This conclusion left the question for the Lelsz court as to "whether the district court may enforce the consent decree beyond the guarantees contained in the federal Constitution and laws simply because it is a consent decree." The court held ultimately that such enforcement violated the eleventh amendment. That question is inartfully formed, however, since the precise question was whether a district court can enforce a consent decree based solely on state law. The Lelsz court held that such enforcement violated Pennhurst. To the extent the Lelsz court answered a broader question, that answer is dicta. See discussion of Ibarra v. Texas Employment Comm'n, below.

18 This conclusion was strongly attacked by Judge Reavley in an opinion dissenting from the denial of a petition for rehearing en banc. See 815 F.2d at 1035-37. Seven of the fourteen judges voting dissented from the denial of the motion for rehearing. Of particular note is the following portion of Judge Reavley's dissent:

> In a contested case, in which a pendent state-law claim is asserted, Pennhurst requires the federal court to look at the source of the

Lelsz has been interpreted in Ibarra v. Texas Employment Commission, 823 F.2d 873 (5th Cir. 1987). Ibarra construed Lelsz as applying Pennhurst to vacate a portion of the district court order enforcing the consent decree when the relief provided by that part of the decree was grounded solely on state law. 823 F.2d at 877, citing Lelsz, 815 F.2d at 1034. The Ibarra court held:

> Assuming without deciding that Pennhurst would extend to a federal court order approving a consent decree, we conclude that Pennhurst does not apply to the present case because the consent decree is not based on state law. ... The concerns about state sovereignty and the lack of any federal interests that were critical to Pennhurst are not appropriate when, as in this case, the issue is one of interpreting federal law.

Thus, any implication that the Lelsz holding went beyond an application of Pennhurst to a consent decree based solely on state law is eliminated dispositively by Ibarra.[19]

Lelsz, as clarified in Ibarra, then, reads Pennhurst to hold that a federal court does not, under Pennhurst, have jurisdiction to approve a consent decree predicated solely on state law violations since to do so would offend the eleventh

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> claim, but where the parties have not separated their claims and remedies and agree on remedies for both, Pennhurst itself places no jurisdictional limitation upon the federal court in enforcing the agreement

Lelsz, 815 F.2d at 1036.

19 Cf. Welsch v. Gardebring, 667 F. Supp. 1284, 1289 (D. Minn. 1987), which is discussed below in note 22.

amendment.[20] This doctrine has no bearing, however, on the present case. Here, the plaintiffs' first amended complaint alleged violations of federal law. In response to that complaint, the parties agreed to entry of comprehensive relief. It is literally true that every substantive section of the consent decree is tied to factual allegations in the first amended complaint, which form the factual predicate for plaintiffs' claim that the totality of conditions at the Penitentiary of New Mexico offends the United States Constitution.[21]

The foregoing discussion produces two clear conclusions, each of which mandates rejection of each separate strand of defendants' argument.

First, because the complaint named state officials in their official capacity as defendants in a suit seeking purely injunctive relief for federal constitutional violations, the

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[20] Again, Judge Reavley's distinction between a pure state law claim, and mixed claims, is critical but ignored in Lelsz.

[21] The following chart demonstrates the relationship between paragraphs in the first amended complaint and portions of the consent decree.

Correspondence -	¶ 28
Public/Attorney Visitation -	¶ 27
Food Service -	¶ 21
Legal Access -	¶¶ 30, 31
Visitation -	¶ 27
Classification -	¶ 24
Living Conditions -	¶¶ 16, 17, 18, 19, 20
Inmate Activity -	¶¶ 19, 24, 25, 26
Medical Care -	¶ 29
Mental Health Care -	¶ 29
Staffing and Staff Training -	¶¶ 22, 23
Maximum Security -	¶ 23
Inmate Discipline -	¶ 32

eleventh amendment did not afford defendants sovereign immunity. Accordingly, the Court had, and has, jurisdiction over the civil action. See Welsch v. Gardebring, 667 F. Supp. at 1288-89.[22]

Second, because each element of the relief afforded in the consent decree is tied to a factual allegation in the complaint asserting federal constitutional violations based on the totality of the circumstances, the Court had jurisdiction to enter the consent decree.[23] Thus, defendants' argument that the consent

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22 In Welsch v. Gardebring, the defendants, in challenging the court's jurisdiction to approve a consent decree, made essentially the same argument which is presented here in defendants' motion. The district court's rejection of that argument is predicated on analysis of Pennhurst, Ex Parte Young, and Local No. 93 v. City of Cleveland, as is done in this opinion.

23 Defendants' reliance on Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983), is also misplaced. In Penwell, the defendants sought to vacate a provision of the consent decree that required the state to fund a prisoners' legal services organization at a defined level. That provision had been entered by consent in response to a claim that indigent Oregon prisoners were provided with inadequate legal facilities. The court of appeals affirmed the district court's decision vacating the challenged portion. In doing so, the court noted that the provision on its face ran against the State of Oregon and did not limit the decree to the defendants' best efforts to obtain state funding. 700 F.2d at 574. As such, the provision ran afoul of the eleventh amendment. It has long been established that a court order running directly against the state treasury violates the eleventh amendment. See, e.g., Edelman v. Jordan, supra.

Certain language in Penwell suggests that the funding provision is unenforceable not only because it runs directly against the state but also because it is more than is required to alleviate violations of federal law. This language, however, must be viewed in context of the full discussion of the case, which notes that "if general legal services for prisoners were required by the Constitution, we might be able to enforce this provision, notwithstanding the state's protest." 700 F.2d at 574. That language follows immediately the court's discussion of Edelman and Young. In this context, then, the Penwell holding must be stated as follows: Where a provision in a federal court order explicitly runs directly against the state treasury, and cannot be construed as a provision enforcing federal law which will have an ancillary effect on the state treasury (thereby bringing the injunction within the scope approved by Edelman), the provision is unenforceable. So construed, Penwell does not apply to the present circumstance. First, there is no provision in the consent decree in this case that specifically requires funding by the State of New Mexico. Second, every section of the consent decree in this case is tied to an allegation of federal constitutional deprivation.

decree approved by the Court in this case is void because it abrogates the state's eleventh amendment immunity, is unavailing.

The second major premise of defendants' argument is that even when federal jurisdiction exists, the principle of comity prohibits the entry of relief, even by consent, that extends beyond the measures the Court could have imposed following trial. There is no authority cited by the defendants or discovered by the Court that supports this novel proposition. Indeed, the same proposition was rejected by the United States Supreme Court in Local No. 93 (Firefighters) v. City of Cleveland, supra.[24]

In Firefighters, the Supreme Court reviewed a consent decree that indisputably granted to plaintiffs substantive relief that went beyond what could have been granted following a trial on the merits. Faced with a challenge that such relief was unauthorized for that the reason, the Supreme Court rejected the contention. As made clear by a lengthy discussion of the nature of consent decrees, the Court concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." 92 L. Ed. 2d at 425. In fact, the Supreme Court held that relief in the form of a consent judgment is constrained only by principles of illegality in that a federal court cannot approve relief that would require a violation of substantive law. There is, of course, nothing in the consent

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[24] Defendants' citation to Nelson v. Collins, 659 F.2d 420, 429 (4th Cir. 1981) (en banc), is inappropriate. In Nelson v. Collins, no constitutional violation was established. Understandably, when there is no violation, equity has no standing to provide a remedy. Nelson does not support any other principle.

decree in this case which requires the defendants to violate any law.

Defendants' attempt to apply the principles of comity and restraint to the Court's review of a consent decree also suggests a peculiar paradox. Were the Court to reject a consent judgment, agreed to by the defendants, on the basis of comity considerations, it would thereby be arrogating the authority of duly empowered state officials to determine the proper operation of state institutions -- precisely the judicial act that most offends the defendants. The essence of the consent decree -- its animation, in the words of the Supreme Court (see Firefighters, supra at 425) -- is the consent of the party. Here, the properly named state officials, following negotiations, freely agreed to provisions that would govern the operation of the state's prisons. It would be a bizarre perversion of the principle of comity to suggest that a federal court is required, in order to preserve state autonomy, to override the decisions of state officials and substitute its own judgments.

Several references to defendants' brief will suffice to demonstrate the internal contradiction of defendants' argument. In footnote 1, page 2, the defendants contend that "a federal court ordinarily should accept any reasonable remedial proposal made by ... defendants," citing New York State Association for Retarded Children, Inc. v. Carey, 706 F.2d 956, 971 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). "A federal court is not empowered to 'impose upon [governmental agencies] their views of what constitutes wise economic or social policy.'" Defendants'

brief at p. 4, citing Dandridge v. Williams, 397 U.S. 471, 486 (1970). Federal courts should exercise "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 111 (1981).[25]

This Court had no cognizable basis on which to alter the structure or detail of the negotiated consent judgment presented to it for review and approval by the parties.[26] Given that the civil action was properly before the Court, its review of that judgment was limited to a determination of whether any of the relief contained in the decree was illegal and whether the relief was sufficient to protect the interests of the plaintiffs' class. The Court conducted the appropriate review and consequently approved the consent decree. There is no basis for the Court's independent application of its judgment as to the propriety of the specific relief agreed to by the parties in view of the appropriate presumption that the parties have negotiated at arms

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[25] McNary is the only case this Court has discovered that discussed comity as a jurisdictional constraint. Of course, McNary arose in the peculiar and unique context of a challenge to a state taxing scheme. The restraint on the federal court in such an action derives from the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits district courts from enjoining state tax activities where there is a plain, speedy and efficient remedy in the courts of that state. See 454 U.S. at 103. See also Tulley v. Griffin, 429 U.S. 68, 73 (1976), quoted in Rosewell v. Lasalle National Bank, 450 U.S. 503, 522 (1981).

[26] Indeed, when presented with a consent decree compromising a class action, the Court is limited to one of two actions: approving the decree, or rejecting it. It is elemental that in conducting a Rule 23 review of a proposed class action compromise, the Court may not substitute its judgments of fairness for those of the litigants. Plainly, the Court would be without authority to enter a consent judgment other than that agreed to by the parties, since the consent of the parties would no longer animate the decree.

length and have agreed that the structure of remedies in the consent decree is a fair resolution of their competing claims.

IX. MODIFICATION.

Defendants' motion also seeks to vacate portions of the 1980 decree. Although the rule under which this relief is sought is not explicated, the structure of the argument makes clear defendants seek relief under Rule 60(b)(4), Fed. R. Civ. P., which provides that relief from final judgment should be granted when "the judgment is void." See Defendants' brief, p. 13. As noted earlier, footnote 1 of defendants' brief suggests that if their comity-based arguments are rejected at the jurisdictional level, they should inform the Court's assessment of the propriety of modification. As is made clear in this order, defendants' jurisdictional arguments seeking vacation of the decree are rejected in that they are unsupported by existing law. The Court is mindful, however, that under certain circumstances, a judgment may be modified or altered in its prospective application. The potential legal bases for action of this kind need not be set out here, although the Court has addressed the issue as a general matter previously. See Order of October 3, 1986. That order evidences the Court's awareness of United States v. Swift, 286 U.S. 106 (1932); New York Association for Retarded Children, Inc. v. Carey (Willowbrook), supra; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), and related cases.

The "flexible" approach to modification set out in Carey and related cases permits the Court to assess requests for modification that promote the interest of comity by preserving

state administrative discretion as to the means of accomplishing the particular objectives set forth in a decree. That process, however, involves careful assessment not only of the structure of the order and its relationship to administrative discretion, but of other factual considerations including, but not limited to, the state of compliance with existing orders, the degree to which any federal constitutional violations have been cured "root and branch," and the existence of safeguards to prevent future violations. That complex inquiry is one the Court will not undertake in the absence of an appropriate, comprehensive evidentiary record and a thorough briefing on the appropriate standards for modification, to include the equitable bases for modification and the particular modification sought.[27]

X. CONCLUSION.

The eleventh amendment does not provide immunity to state officials from equitable actions based on federal constitutional rights. The comity limitations urged by the defendants do not require the Court to interfere with the considered judgments of parties in the fashioning of the consent judgment. The defendants' motion to vacate will be denied.

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[27] The Court is mindful that some endeavor to this end has been undertaken previously. The defendants, however, terminated that process by filing the motion that is the subject of this order.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motion to vacate be, and the same hereby is, denied.

DATED this 11th day of February, 1988.

United States District Judge

Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARREY CARRUTHERS, Governor;
O. LANE MCCOTTER, Secretary of Corrections;
ROBERT TANSEY, Warden, PNM,
Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293,
SHARON TOWERS, and all others similarly situated;
JAMES C. GIBSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents attempt to show that the ruling of the Tenth Circuit dismissing petitioners' appeal of a post-judgment attorney's fee award was appropriate and that it leaves petitioners avenues for future appellate review of the order at issue. These efforts to defend the Tenth Circuit's ruling are demonstrably unavailing, however, and corrective action by this Court remains essential.

1. Faced with recent decisions in this Court and seven other circuits giving plenary review to fee awards in settings exactly comparable to the present case, respondents offer only a very limited response. They do not attempt to distinguish the cases cited by petitioners, or to cite even a single decision from another circuit supporting their position. Nor do they present more than a cursory defense of the Tenth Circuit's application of the *Cohen* "collateral order" doctrine in this context. Instead, respondents rely on the fact that these other cases do not expressly address the jurisdictional question. The suggestion appears to be that this Court and the seven other circuits simply overlooked the issue of their own jurisdiction and would have agreed with the Tenth Circuit's jurisdictional conclusion if the issue had been presented to them.[1]

This response, of course, ignores the fact that every appellate court has a duty to consider its own jurisdiction before reaching the merits. Moreover, it is especially untenable in view of the cryptic nature of the Tenth Circuit's ruling,[2] and that court's reliance on a single, clearly inapposite precedent involving appeals of *pre*-judgment fee awards.[3] In sum, there is literally nothing to indicate

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[1] As respondents acknowledge, Br. at 5 n.1, one of the decisions that petitioners cite, *Keith v. Volpe*, 833 F.2d 850 (9th Cir. 1987), did expressly hold that the fee order at issue was appealable under 28 U.S.C. § 1291. 833 F.2d at 851. Their sole response to this holding is to comment that the Ninth Circuit did not offer further explanation of its jurisdictional holding and thus may not have had appealability in mind. Br. at 5 n.1. The more plausible conclusion, however, is that the Ninth Circuit simply viewed the jurisdictional issue as clear and saw no need to present an extended discussion.

[2] As we discussed in the petition, the Tenth Circuit's ruling relies on the proposition that the fee award would be reviewable at the time of the "final award," Pet. App. 3a—without offering any explanation of when or how such a final award would ever occur in this post-judgment context.

[3] Pet. App. 3a (citing *In re Callister*, 673 F.2d 305 (10th Cir. (1982)).

that the court below has discovered a dispositive jurisdictional problem that has gone unseen everywhere else. To the contrary, it seems clear that if this case were in another circuit, petitioners' appeal would not have been dismissed.

2. Respondents attempt to shore up the Tenth Circuit's ruling by suggesting a variety of ways in which petitioners may be able to obtain later appellate review of the present fee award. First, they indicate that the award may be modified in some later fee order covering a later period of time during the implementation process. Br. at 3. This assertion is wholly unsupported by any reference to a statement by the district court that it considers the present fee award to be tentative or subject to later revision. Nor is there any other reason to anticipate such retroactive reconsideration of the present award. It follows that respondents are relying solely on the theoretical power of the district court to revise its prior ruling—a power that is clearly insufficient to preclude immediate review of an order that is definitive on its face. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983).

Second, respondents assert that this litigation will one day "draw to conclusion, at which time all previously nonappealable orders will merge with the final judgment and become reviewable." Br. at 8. This argument, however, merely repeats the Tenth Circuit's error by misunderstanding the difference between pre- and post-judgment orders. In a pre-judgment setting, as the case cited by respondents indicates,[4] there is always a subsequent event—*i.e.*, the judgment—that triggers an appeal of earlier interlocutory orders. Here, by contrast, the judgment was entered in 1980, and the case is proceeding

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[4] *See* Br. at 8, citing *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976), which held that a class certification order is not appealable until after judgment.

with "implementation" of a permanent injunction. While the level of monitoring or other activity in the case may ultimately decline, the injunction itself may stay in place indefinitely. Thus, regardless of what respondents may mean when they anticipate a future "conclusion" of the case, they have not presented a valid argument for deferring appeals of post-judgment orders prior to that unspecified event.

Finally, respondents suggest that petitioners could seek to appeal the 1985 fee award at issue here as an issue pendent to our appeal from a recent order denying a motion to vacate portions of the underlying consent decree. This theory does not, however, solve the problems created by the Tenth Circuit's ruling. To begin with, the proposition that the Tenth Circuit would entertain such an appeal is speculative at best. The motion to vacate, which petitioners have recently appealed, was made in 1987—two years after the time period covered by the fee award—and the appeal primarily involves Eleventh Amendment arguments unrelated to respondents' activities during this earlier period. Even assuming that the Tenth Circuit has the discretionary authority to allow a simultaneous "pendent" appeal of the earlier 1985 fee order, it would exercise that discretion on the basis of its perception of how closely related the two orders are. *See Moore's Federal Practice* ¶ 110.25[1], at 270, 272 (emphasis added). Thus, even if petitioners were to accept respondents' invitation to link the fee issue with their appeal of the denial of the motion to vacate, on the present facts their chances of success would hardly be overwhelming.[5]

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[5] We note that respondents have only recently filed a motion in the district court seeking fees and costs for their successful opposition to the motion to vacate itself. A ruling on this motion might be appealable pendent to the appeal of the underlying ruling, but only if the district court acts in time to allow consolidation. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2180 (1987).

In any event, the existence of a theoretical and very speculative alternative avenue for appellate review in this instance depends on the fortuity that the district court recently issued a separate appealable order. It thus does not solve the problems that will face petitioners if and when the district court rules on the hundreds of thousands of dollars worth of fee requests now pending in that court. There is absolutely no reason to believe that these future orders could be linked on appeal with a separate appealable order. It is far from clear, for example, that either party will be filing additional motions to modify the consent decree that could form the basis for a separate appeal. Thus, even assuming the validity of respondents' imaginative suggestion for obtaining review of the present order, the Tenth Circuit's erroneous dismissal of the present appeal makes it quite possible, perhaps even likely, that petitioners will one day be saddled with huge fee awards that can never be tested in the court of appeals.

3. Respondents conclude their brief by arguing that the present unpublished order of the Tenth Circuit does not raise issues of sufficient importance to warrant the attention of this Court. It is true, of course, that the decision below does not create a formal conflict among the circuits. But that decision leaves the State of New Mexico in the unconscionable position of facing this and future fee awards without any real means for obtaining review. Petitioners are left with no guidance from the court below about precisely why this order was not final, or precisely when, if ever, an appealable order will be issued. And they are left in this position because of a ruling that is flatly and glaringly incorrect. Finally, since the Tenth Circuit apparently considers its ruling so clear as to create no need even for a published decision, there is reason to fear that other parties seeking review of fee orders in other cases—whether plaintiffs or defendants—will be put in the same untenable predicament.

For these reasons, we submit that the ruling below warrants either a summary reversal or a grant of plenary review.

Respectfully submitted,

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